Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Columbia Care and Rehabilitation Center
Docket No. A-10-89
Decision No. 2348
December 6, 2010

REMAND OF ADMINISTRATIVE LAW JUDGE DECISION

Columbia Care and Rehabilitation Center (Columbia, Petitioner), a long-term care facility in Tennessee that participates in both the Medicare and Medicaid programs, requests review of the August 12, 2010 decision of Administrative Law Judge Carolyn Cozad Hughes, *Columbia Care and Rehabilitation Center*, DAB CR2212 (2010) (ALJ Decision). The ALJ granted the Centers for Medicare & Medicaid Services' (CMS's) motion for summary judgment, sustaining CMS's imposition of a $6,800 per-day civil money penalty (CMP) for one day of noncompliance at the immediate jeopardy level with Medicare participation requirements at 42 C.F.R. §§ 483.25(h) and 483.75 as well as certain provisions of the Life Safety Code (LSC). Columbia did not challenge before the ALJ a $200 per-day CMP imposed for 44 days of noncompliance not at the immediate jeopardy level.

As explained below, we conclude that the ALJ erred in sustaining the $6,800 per-day CMP because she did not view the undisputed facts in the light most favorable to Columbia in concluding that it failed to comply substantially with the requirements in question. We therefore remand this case to the ALJ to conduct further proceedings consistent with this decision.

Applicable Law

The Social Security Act (Act) and federal regulations provide for state agencies to survey a long-term care facility to evaluate compliance with the Medicare and Medicaid participation requirements. Sections 1819 and 1919 of the Act; 42 C.F.R. Parts 483, 488, and 498.[1] The participation requirements are set forth at 42 C.F.R. Part 483, subpart B. A

[1] The current version of the Social Security Act can be found at http://www.socialsecurity.gov/OP_Home/ssact/ssact.htm. Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section. Also, a cross-reference table for the Act and the United States Code can be found at 42 U.S.C.A. Ch. 7, Disp Table. 2.

facility's failure to meet a participation requirement is called a "deficiency." 42 C.F.R. § 488.301. "Substantial compliance" means a level of compliance such that "any identified deficiencies pose no greater risk to resident health or safety than the potential for causing minimal harm." *Id.* "Noncompliance" is defined as "any deficiency that causes a facility to not be in substantial compliance." *Id.* Surveyor findings are reported in a statement of deficiencies (SOD), which identifies each deficiency under its regulatory requirement and a corresponding "tag" number used by surveyors for organizational purposes. Each deficiency is assigned a level of severity (whether it has created a "potential for harm," resulted in "actual harm," or placed residents in "immediate jeopardy") and a scope of the problem within the facility (whether it is "isolated," constitutes a "pattern," or is "widespread"). 42 C.F.R. § 488.404; State Operations Manual (SOM), CMS Pub. 100-07, App. P - Survey Protocol for Long-Term Care Facilities (available at http://www.cms.hhs.gov/ Manuals/IOM/list.asp), sec. V. A long-term care facility determined to be not in substantial compliance is subject to enforcement remedies, which include CMPs. 42 C.F.R. §§ 488.402(c), 488.406, 488.408. CMS may impose either a per-instance or per-day CMP when a facility is not in substantial compliance. 42 C.F.R. § 488.408(d)(3)(i). A per-day CMP may accrue from the date the facility was first out of compliance until the date it achieved substantial compliance. 42 C.F.R. § 488.440(a)(1), (b). For noncompliance determined to pose immediate jeopardy to facility residents, CMS may impose a per-day CMP in an amount ranging from $3,500 to $10,000 per day. 42 C.F.R. § 488.408(d)(1)(iii). The regulations set out several factors that CMS considers to determine the CMP amount. 42 C.F.R. §§ 488.438(f), 488.404.

The participation requirements cited at the immediate jeopardy level in this case were 42 C.F.R. §§ 483.25(h) and 483.75 as well as certain Life Safety Code provisions made applicable by 42 C.F.R. § 483.70.

Section 483.25(h) states in relevant part:

> *Accidents*. The facility must ensure that—
> (1) the resident environment remains as free of accident hazards as is possible[.][2]

Section 483.75 states:

> A facility must be administered in a manner that enables it to use its resources effectively and efficiently to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident.[3]

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[2] The surveyors cited the deficiency under section 483.25(h), quoting both subsections (h)(1) and (h)(2); however, the ALJ Decision refers only to the language of section 483.25(h)(1). *Compare* CMS Ex. 1, at 9 *with* ALJ Decision at 4.

[3] The deficiency was cited only under the lead-in language of section 483.75, not any of the subsections that follow.

Section 483.70, captioned "Physical environment," provides in pertinent part:

> The facility must be designed, constructed, equipped, and maintained to protect the health and safety of residents, personnel and the public.
> (a) *Life safety from fire.* (1) Except as otherwise provided in this section—
> (i) The facility must meet the applicable provisions of the 2000 edition of the Life Safety Code of the National Fire Protection Association. The Director of the Office of the Federal Register has approved the NFPA 101® 2000 edition of the Life Safety Code, issued January 14, 2000, for incorporation by reference.

The edition of the LSC to which section 483.70(a)(1)(i) refers includes requirements that: (1) smoke barrier doors close automatically when the facility's alarm system is activated; (2) a facility conduct a fire drill at least quarterly on each shift; and (3) locked exit doors unlock during the activation of the alarm system.[4]

Case Background

The Tennessee State Survey Agency (survey agency) conducted an annual recertification survey at Columbia on September 14-16, 2009. The survey agency also conducted an annual life safety code (LSC) survey at Columbia on September 14-15, 2009. As part of the LSC survey, Columbia conducted a fire drill on September 14. The SOD for the annual recertification survey found deficiencies at the immediate jeopardy level under sections 483.25(h) (Tag F 323) and 483.75 (Tag F 490). The SOD for the life safety recertification survey found three deficiencies under NFPA 101 at the immediate jeopardy level: Tags K 021, K 050 and K 130. With the possible exception of Tag K 050, the deficiency findings were all related to the survey findings that, during the fire drill on September 14, two smoke barrier doors did not close, and four of six exit doors on the facility's main residential level did not unlock. The SODs contained additional deficiencies at lower scope and severity levels.

Based on the survey findings, CMS imposed per-day CMPs of $6,800 for one day of immediate jeopardy (September 14, 2009) and $200 for each of 44 days not at the immediate jeopardy level.[5] Columbia requested an ALJ hearing, challenging only the findings of noncompliance on which the $6,800 CMP was based.

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[4] The text of the Life Safety Code itself is not in the record and is incorporated only by reference in the regulation. Columbia does not dispute, however, that the provisions in question are correctly quoted in the SOD resulting from a life safety code survey at the facility from which we draw this summary. *See* CMS Ex. 2, at 2-3, 34-35.

[5] The ALJ Decision states that the $6,800 CMP was 'for one day of immediate jeopardy" and refers to it as a "per instance CMP." ALJ Decision at 1-2. However, CMS's September 29, 2009 notice stated that it was imposing a CMP in the amount of $6,800 "per day," and both parties agree that it is a per-day CMP. RR at 2; CMS Br. at 1, n.1.

After the ALJ issued an initial pre-hearing order, CMS filed a motion for summary judgment, alleging that the undisputed facts established that Columbia was not in substantial compliance with sections 483.25(h) and 483.75 at the immediate jeopardy level. CMS did not request summary judgment based on the LSC deficiency findings, asserting that Columbia had not requested a hearing on these findings. Columbia opposed CMS's motion and also maintained that its hearing request pertained to all of the immediate jeopardy level findings.

The ALJ Decision

The ALJ granted summary judgment for CMS, stating:

> CMS is entitled to summary judgment, because the undisputed evidence establishes that the facility failed to monitor and maintain the proper operation of its fire alarm system. As a result: 1) the resident environment was not as free of accident hazards as possible, as 42 C.F.R. § 483.25(h) required; 2) the facility was not administered in a manner that would effectively ensure that its residents maintain their highest practicable wellbeing and safety, as 42 C.F.R. § 483.75 required; and 3) the facility did not meet applicable provisions of the LSC.

ALJ Decision at 3 (Finding of Fact and Conclusion of Law (FFCL) A). The ALJ also concluded that "CMS's immediate jeopardy finding is not clearly erroneous." *Id.* at 6 (FFCL B).

In her discussion of FFCL A, the ALJ concluded, in part:

> Because the facility did not take the "reasonable step" of conducting at least one fire drill to ensure that its new alarm system operated properly, the facility did not ensure that the resident environment was as free of accident hazards as possible (42 C.F.R. § 483.25(h)), nor that all requirements of the LSC were met (*see* 42 C.F.R. § 483.70(a)). Further, these deficiencies establish that the facility was not administered in a manner that enabled it to use its resources effectively and efficiently to maintain the highest practicable well-being of its residents (42 C.F.R. § 438.75). The facility was therefore not in substantial compliance with Medicare requirements.

ALJ Decision at 6. The ALJ rejected Columbia's argument that "it should not be held accountable for the system's failure, because, prior to the September 14 drill, it did not know, or have reason to know, that its system was not working properly." *Id.* at 4. According to the ALJ, "the undisputed evidence establishes otherwise." *Id.* The ALJ stated that "[a]s Petitioner acknowledges, its system had been malfunctioning since at least July 3." The ALJ continued: "Petitioner admits that the new system did not function properly, requiring additional repairs on August 31. The facility thus had ample reason to suspect that its alarm system might malfunction. After all, repairs had been made before,

with the system pronounced functional when it was not." *Id.* at 5. The ALJ cited to the SOD for the recertification survey and Columbia's informal dispute resolution (IDR) submission as "highlighting that the system required repairs on May 21, July 3, August 25, August 26, and August 31, 2009." *Id.* at 4.

In her discussion of FFCL B, the ALJ concluded that CMS's immediate jeopardy determination was not clearly erroneous, stating:

> Because the smoke barrier doors would remain open during a fire, the fire and its accompanying smoke would have spread, unchecked, through the residences. And because the exit doors remained locked and could not be opened, facility residents and staff could have been locked in a burning building.

ALJ Decision at 6. The ALJ rejected Columbia's arguments that there was no immediate jeopardy because it could not have foreseen the fire alarm system's malfunction and because it quickly corrected the problems after the system malfunctioned. Referring to her discussion of FFCL A, the ALJ stated that Columbia "had ample notice that its alarm system might not function properly when needed, but did not once test its new system by conducting a fire drill." *Id.* The ALJ also stated that the fact that the problems were quickly corrected "neither eliminated the deficiency, nor decreased its scope and severity." *Id.*

<u>Standard of review</u>

Whether summary judgment is appropriate is a legal issue that we address de novo. *See, e.g., Andrew J. Elliott, M.D.*, DAB No. 2334, at 2 (2010); *Lebanon Nursing and Rehabilitation Center*, DAB No. 1918 (2004). The party moving for summary judgment bears the initial burden of demonstrating that there are no genuine issues of material fact for trial and that it is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-25 (1986); *Everett Rehabilitation and Medical Cente*r, DAB No. 1628, at 3 (1997). If a moving party carries its initial burden, the non-moving party must "come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec. Industrial Co. v. Zenith Radio*, 474 U.S. 574, 587 (1986) (quoting Fed. R. Civ. Pro. 56(e)). In deciding a summary judgment motion, a tribunal must view the entire record in the light most favorable to the nonmoving party, drawing all reasonable inferences from the evidence in that party's favor. *Madison Health Care, Inc.*, DAB No. 1927 (2004).

Although the Federal Rules of Civil Procedure do not apply by their own terms in this administrative proceeding, we are guided by those rules and by judicial decisions on summary judgment in determining whether the ALJ properly granted summary judgment. *See Thelma Walley v. Inspector General*, DAB No. 1367 (1992). In the present case, the ALJ informed the parties that she would decide motions for summary judgment "according to the principles of Rule 56 of the Federal Rules of Civil Procedure and applicable case law." Initial Pre-Hearing Order dated 12/1/09.

Columbia's arguments

Columbia disputes both FFCLs. According to Columbia, the ALJ erred in finding that it did not "take the 'reasonable step' of conducting at least one fire drill" after the fire alarm panel was replaced on August 25-26, 2009. RR (quoting ALJ Decision at 6). Columbia relies on evidence, undisputed by CMS, that after installing the new fire alarm panel, the fire alarm company's technician tested the fire alarm system, including the smoke and exit doors, on three separate occasions and found the system "all normal." Columbia's Opposition to Respondent's Motion for Summary Disposition (Columbia Opp.) at 3, citing SODs; *see also* RR at 6. In addition, Columbia relies on evidence, also undisputed by CMS, that the LSC surveyor told Columbia's Administrator that the facility did not need to conduct its own fire drill after the August 25-26 repairs because the fire alarm company had tested the system. Columbia Opp. at 4, citing Pet. Ex. 1, at 6, §3(b); *see also* RR at 7. Columbia takes the position that the fact that the fire alarm system did not work during the September 14 fire drill was not a basis for finding it out of compliance with the applicable participation requirements since the "simulated fire drills" by the fire alarm company were a better test of whether its fire alarm system was operating properly than a single fire drill would have been. Columbia Reply Br. at 2. Columbia also argues that any noncompliance did not pose immediate jeopardy because there was no basis for finding Columbia culpable for the malfunctioning of the fire alarm system on September 14.

Analysis

It is well-established that the provisions of section 483.25(h) "come into play when there are conditions in a facility that pose a known or foreseeable risk of accidental harm." *See, e.g., Meridian Nursing Center*, DAB No. 2265, at 9 (2009). The Board has also held that section 483.25(h)(1) requires that a facility address foreseeable risks of harm from accidents by "identifying and removing hazards, where possible, or where the hazard is unavoidable because of other resident needs, managing the hazard by reducing the risk of accident to the extent possible." *Maine Veterans' Home – Scarborough*, Dab No. 1075, at 10 (2005).

The ALJ concluded that Columbia failed to comply substantially with the applicable participation requirements because it had not addressed the foreseeable risk that its fire alarm system might malfunction after the fire alarm panel was replaced during the August 25-26 service call. The ALJ found specifically that Columbia "had ample reason to suspect that its alarm system might malfunction" after that repair because the fire alarm system was also repaired on May 21, July 3, August 25-26, and August 31. ALJ Decision at 5. We conclude, however, that Columbia raised a genuine issue of material fact regarding whether it was foreseeable that the fire alarm system might malfunction. As noted above, it is undisputed that: 1) the technician from the fire alarm company tested the fire alarm system three times after making the repairs on August 25-26 and found that the fire alarm system was fully operational; and 2) the LSC surveyor told Columbia's administrator during the LSC survey that it need not have conducted a fire drill after those repairs were made on August 25-26 since the fire alarm company had

already tested the fire alarm system. A reasonable inference that could be drawn in Columbia's favor from these facts is that Columbia did not know, or have reason to know, that its fire alarm system might malfunction after the repairs were made on August 25-26 because the testing done by the fire alarm company after these repairs were completed showed that the fire alarm system was working properly. Moreover, we conclude for the following reasons that the limited evidence in the record regarding the repairs on the other dates does not conclusively establish that Columbia could not reasonably rely on the testing on August 26.

- There is nothing in the record showing that the fire alarm company tested the fire alarm system when it made the repairs on either May 21 or July 3, much less that on either date testing was repeated three times, as it was on August 26.

- There is nothing in the record showing that the July 23 repairs were related to the same problem as the May 21 repairs, which might indicate that the May 21 repairs were unsuccessful.

- There is nothing in the record indicating that the July 23 repairs were unsuccessful. To the contrary, it is undisputed that Columbia conducted a fire drill during the first and second shifts on August 21 and that no problems were documented. Columbia Opp. at 3, citing SODs; *see also* RR at 6.

- The record shows that the purpose of the August 31 service call was to replace the annunciators with three new annunciators ordered by the fire alarm company during the August 25-26 service call. CMS Ex. 1, at 13-14. Thus, the fire alarm company was merely repairing a problem it had noticed when it made the repairs on August 25-26. Moreover, it is undisputed that the annunciators did not control the smoke barrier doors or the exit doors. Columbia Opp. at 5, citing Pet. Ex. 1, at 8; *see also* RR at 8. Thus, the record does not establish that these repairs were the cause of the smoke barrier doors not closing and the exit doors not unlocking during the September 14 fire drill.

There are additional ambiguities in the record that may warrant further development as well. As the ALJ noted, the fire alarm company found several wires connected incorrectly on August 31 and the fire alarm system then required additional repairs on September 15. ALJ Decision at 5; CMS Ex. 1, at 14; CMS Ex. 3, at 1. The record does not establish, however, that the September 15 repairs involved these wires or that these wires were responsible for the malfunctioning of the smoke barrier doors and exit doors during the September 14 fire drill.

We therefore conclude that the ALJ did not view the undisputed facts in the light most favorable to Columbia in concluding that Columbia failed to comply substantially with the requirement at section 483.25(h). We reach the same conclusion with respect to the requirement at section 483.75, which is merely derivative of the noncompliance with section 483.25(h). Accordingly, the ALJ erred in granting summary judgment to CMS on the issue of Columbia's noncompliance with these two participation requirements.

As noted, the ALJ Decision rests on the finding that Columbia "had ample reason to suspect that its alarm system might malfunction" after the new alarm panel was installed on August 25-26. ALJ Decision at 5. The ALJ Decision appears to rely on this finding in concluding that Columbia failed to comply substantially with the LSC provisions as well as with sections 483.25(h) and 483.75.[6] The ALJ does not explain why, as her statement seems to assume, a finding of foreseeability is required in order to conclude that Columbia was out of compliance with the LSC requirements. If this finding is required (a matter we do not reach given the posture of the case), then the ALJ also erred in concluding that Columbia was out of compliance with the LSC requirements since we have concluded a reasonable inference could be drawn to support Columbia's position that it was not foreseeable that the doors would malfunction.

The ALJ's conclusion that Columbia was out of compliance with the LSC requirement cited under Tag K 050 that a facility conduct a fire drill at least quarterly on each shift is also erroneous for another reason.[7] It is undisputed that Columbia's practice was to conduct one fire drill per shift per month and that Columbia conducted a fire drill on the first and second shifts on September 21, 2009. Columbia Opp. at 3; CMS Ex. 1, at 14-15. Assuming that the facility had only two shifts (a matter not addressed in the record), a reasonable trier of fact could infer from these undisputed facts that Columbia conducted a fire alarm at least quarterly on each shift, as required by the LSC. Accordingly, Columbia raised a genuine issue of material fact with respect to its compliance with this particular LSC requirement.

Moreover, CMS did not move for summary judgment based on the LSC deficiency findings. An ALJ may not grant summary judgment on a ground not alleged by the moving party without providing adequate notice and an opportunity to show that a genuine dispute of material fact exists. *See e.g., Daniel H. Kinzie, IV, M.D.*, DAB No. 2341, at 6 (2010); *Community Home Health*, DAB No. 2134 (2007).

We therefore remand the case to the ALJ for further proceedings. If on remand the ALJ upholds an immediate jeopardy CMP based on fewer than the five deficiency findings based on which CMS originally relied, the ALJ should also consider whether a per-day CMP of $6,800 is reasonable. *Cf. Emerald Shores Health & Rehabilitation Center*, DAB No. 2072, at 30 (2007) ("Where the ALJ overturns some of the allegations relied on by CMS, the ALJ must consider the reasonableness of the amount based on the altered factual findings even if the facility did not argue that the amount was unreasonable had

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[6] Notwithstanding its arguments below, CMS did not appeal the ALJ's determination that the issue of whether Columbia complied with the LSC requirements was properly before her.

[7] There is some reason to question whether the ALJ even considered whether Columbia complied with the LSC requirement cited under Tag K 050 that a facility conduct a fire drill at least quarterly on each shift. Although the ALJ Decision states that "the facility did not meet applicable provisions of the LSC" (ALJ Decision at 3), the ALJ elsewhere refers specifically only to the LSC provisions cited under Tags K 021 and K 130 requiring that smoke barrier doors close automatically and exit doors unlock when a facility's fire alarm system is activated. *Id.* at 4.

all the original allegations been upheld."), *reversed sub nom. on other grounds, Emerald Shores Health Care Associates., LLC v. U.S. Dep't of Health & Human Servs.,* 545 F.3d 1292 (11th Cir. 2008)

Conclusion

For the reasons explained above, we remand this case to the ALJ for further proceedings consistent with this decision.

/s/
Sheila Ann Hegy

/s/
Leslie A. Sussan

/s/
Stephen M. Godek
Presiding Board Member